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No. 98-1099

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

AK STEEL CORPORATION,
Petitioner,

v.

JEFF CHAMBERLAIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE DENIED WHERE PETITIONER, DESPITE REPEATED OPPORTUNITIES, FAILED TO RAISE A DUE PROCESS ISSUE PRIOR TO ITS MOTION FOR RECONSIDERATION TO THE OHIO SUPREME COURT?

WHETHER CERTIORARI SHOULD BE DENIED WHERE PETITIONER FAILED TO RAISE A FEDERAL DUE PROCESS ISSUE PRIOR TO ITS PETITION FOR A WRIT OF CERTIORARI AND WHERE ALL PRIOR ARGUMENTS OF PETITIONER AND ALL RULINGS OF THE OHIO COURTS HAVE RELIED SOLEY ON OHIO STATE LAW?

WHETHER CERTIORARI SHOULD BE DENIED WHERE THE DECISION OF THE OHIO SUPREME COURT CAN BE SUSTAINED ON INDEPENDENT STATE LAW GROUNDS?

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I. STATEMENT OF THE CASE

On January 23, 1996, employees of AK Steel, plaintiffs-respondents (hereinafter, "respondents"), filed a class action complaint against defendant-petitioner AK Steel (hereinafter, "petitioner"). Respondents allege that petitioner conducted the operations at its Middletown, Ohio mill in a negligent, intentionally tortious, and ultrahazardous manner under Ohio law.

On March 4, 1997, the trial court ruled that the action may be maintained as a class action, pursuant to Ohio R. Civ. P. 23(B)(2) and Ohio R. Civ. P. 23 (B)(3). On April 2, 1997, petitioner filed a notice of appeal from the order granting class certification. Respondents filed a motion to dismiss the interlocutory appeal on April 11, 1997, on the ground that the order granting class certification was not a final appealable order. On June 20, 1997, the Court of Appeals for Butler County, Twelfth Appellate District of Ohio, dismissed petitioner's appeal. In its decision, the court of appeals held that the order granting class certification was not a final appealable order under Ohio Rev. Code § 2505.02 (hereinafter, "O.R.C. § 2505.02"), because the order was not entered in a special proceeding and did not either determine the action or prevent a judgment. *See* Appendix A.

Petitioner then appealed the decision to the Supreme Court of Ohio. Prior to oral arguments, on April 22, 1998, the Ohio General Assembly adopted an amendment to O.R.C. § 2505.02, which specified that an order granting class certification is a final appealable order. Pursuant to Article II, § 1c of the Ohio Constitution, the amendment could not take effect for 90 days, making its effective date July 22, 1998. Still prior to oral arguments, petitioner submitted a motion to the Supreme Court of Ohio, asking the court to vacate its

hearing on the merits and remand the case to the Butler County Court of Appeals in order for the lower court to consider the then-ineffective amendment. *See* Appendix B. The Supreme Court of Ohio denied this motion. Petitioner then submitted a motion asking the Supreme Court of Ohio for leave to file supplemental briefs to address the amendment. *See* Appendix C. Again, the court denied petitioner's motion. In these motions, petitioner never referred to any due process concerns, much less *federal* due process concerns.

The Supreme Court of Ohio heard oral arguments in this case on May 26, 1998. The court subsequently rendered its 6-1 decision affirming the decision of the Butler County Court of Appeals, which was published on July 29, 1998. Chamberlain v. AK Steel Corp., 82 Ohio St.3d 389, 696 N.E.2d 569 (1998). The dissent by Justice Evelyn Lundberg Stratton made note of the fact that the decision was actually rendered weeks prior to the effective date of the amended O.R.C. § 2505.02. *Id.* at 392.

On August 6, 1998, petitioner filed a motion for reconsideration with the Ohio Supreme Court, asserting that, because its decision was published on July 29, 1998, the court was required to apply the amendment to O.R.C. § 2505.02, which became effective July 22, 1998. Petitioner raised the generic issue of due process for the first time in that motion for reconsideration, but failed to articulate whether this was state or federal due process, and otherwise relied on Ohio law. The Ohio Supreme Court denied the motion without comment. It was not until its petition for a writ of certiorari before this Court that petitioner ever mentioned a federal due process issue.

II. SUMMARY OF THE ARGUMENT

Petitioner fails to raise a justiciable federal issue in its petition to this Court and as such its petition should be denied. The flaws in the petition as a matter of procedure, as a matter of law, and as a matter of fact are manifold. This case does not meet this Court's criteria for the grant of certiorari for a case originating in a state court. A case emanating from a state court will not be heard by this Court if the petitioner did not raise a substantial federal issue in state court; nor if the federal issue is not raised in a timely manner; nor if the state supreme court opinion can be sustained on independent state law grounds.

Petitioner's failure to raise an issue of due process prior to its motion for reconsideration before the Ohio Supreme Court renders its argument untimely for certiorari purposes. Petitioner had occasion to raise this issue in two prior motions it had submitted to the Ohio Supreme Court before that court's decision. In those motions, petitioner requested that the court consider the effects of the impending amendment to O.R.C. § 2505.02. Petitioner failed to raise the issue of due process then, and therefore cannot claim that its reconsideration motion was "the first opportunity" it had to raise a federal issue.

Petitioner cannot establish that the due process issue it raised in its motion for reconsideration was actually a federal due process issue. When a party invokes "due process" before a state court without explicit reference to the United States Constitution, the party is assumed to be referring to a state constitution, where the state constitution also has a due process clause, as Ohio's does. Petitioner premised all of its arguments to the Ohio Supreme Court on Ohio law, and only after its motion for reconsideration was

denied did petitioner make the first suggestion that its due process argument was really a *federal* due process argument. This case involves no federal question, but only an issue of Ohio procedural law as to when the Supreme Court of Ohio decides a case for the purposes of which version of a state law it should apply.

The decision of the Supreme Court of Ohio can be sustained on independent state law grounds as the court properly rendered its decision in accordance with the applicable law at the time the justices made their decision. Petitioner here attempts to make a federal issue of the fact that the Supreme Court of Ohio did not apply the amended O.R.C. § 2505.02 in its ruling, by claiming that Ohio's highest court is refusing to apply the law and that this violates the federal due process clause. Yet, the court clearly made its decision prior to the effective date of this amendment, and since its effective date, the Ohio Supreme Court has applied the amended statute. Thus, the constitutional alarms that petitioner attempts to sound have no resonance.

This case presents only an issue of state law. This Court does not entertain state law issues for the purpose of issuing advisory opinions, and the petition at its core asks no more of this Court. As this case presents no federal issue, no important public issue, and no issue of constitutional dimensions, the petition should be denied.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. Petitioner Did Not Timely Raise a Federal Issue.

The grant of certiorari in this case would be improper

as petitioner failed to raise the issue of federal due process in a timely manner. Petitioner did not raise *any* issue of due process until its motion for reconsideration before the Supreme Court of Ohio. Petitioner did not file its motion for reconsideration until after that court published its decision affirming the dismissal of petitioner's appeal on state law grounds. The Supreme Court of Ohio ultimately denied the motion for reconsideration without comment. Only thereafter, in its petition for a writ of certiorari, did petitioner raise a *federal* due process issue for the first time.

It goes almost without saying that, in a case originating in state court, a federal issue raised for the first time in a petition for a writ of certiorari comes too late. This has remained the steadfast rule. White River Lumber Co. v. Arkansas ex rel. Appelgate, 279 U.S. 692, 700, 49 S.Ct. 457 (1929); Whitney v. California, 274 U.S. 357, 362-363, 47 S.Ct. 641 (1927). A federal issue must first be raised and addressed in the state court record and a petition for a writ of certiorari is not part of the state court record. The federal issue raised here simply was not raised in the state court record.

1. Petitioner Did Not Raise a Federal Issue Merely by Invoking "Due Process" in Its Motion for Reconsideration Before the Supreme Court of Ohio.

Petitioner claims it raised the federal due process issue in its motion for reconsideration before the Supreme Court of Ohio. Under 28 U.S.C. § 1257(a), a party must raise a federal issue in order for this Court to grant jurisdiction. This Court has held that the mere incantation of "due process" is insufficient to invoke its jurisdiction. Bowe v. Scott, 233 U.S.

658, 664-665, 34 S.Ct. 769 (1914); *see also* separate opinion of Justice White in Brady v. Maryland, 373 U.S. 83, 91, 83 S.Ct. 1194 (1963). In its motion for reconsideration before the Ohio Supreme Court, petitioner only mentioned "due process" twice. These references make no mention of the United States Constitution. In fact, the only references to constitutional provisions in the motion for reconsideration were to the Ohio Constitution.

"[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth." New York Central & H.R.R. Co. v. City of New York, 186 U.S. 269, 273, 22 S.Ct. 916 (1902); *see also*, Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981); Bowe v. Scott, 233 U.S. 658.

In Bowe, the petitioner did not raise the federal issue until a motion for rehearing, which the state supreme court denied without discussion. The petitioner then attempted to invoke the jurisdiction of the United States Supreme Court by relying on an averment that an ordinance was an attempt to take rights in property "without due process of law." *Id.* at 664-665. The Court denied certiorari, holding that "it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." *Id.* at 665.[1]

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[1] While this Court has accepted jurisdiction in cases where the United States Constitution was not explicitly invoked, the state courts in those cases expressly discussed the issues raised in light

In the case at hand, petitioner invoked generic "due process," knowing full well that the Ohio Constitution also contains a due process clause, Article I, § 16. Despite this fact, petitioner made no reference in any form to the United States Constitution prior to its petition for a writ of certiorari. Given that due process is part of the Ohio Constitution, and given that petitioner never invoked the federal Constitution in the proceedings before the Supreme Court of Ohio, petitioner has given this Court no basis upon which to assert its jurisdiction. Therefore, this Court must assume the petitioner has invoked only the state constitution, and as such, jurisdiction should be declined.

2. Even If Petitioner Had Raised Federal Due Process For the First Time in its Motion for Reconsideration, The Federal Issue Would Still Have Come Too Late for Review by This Court.

It has been the "long established general rule" that a federal question raised first on a motion for rehearing before a state's highest court comes too late for review by this Court, unless the state supreme court "actually entertains the question and decides it." Herndon v. Georgia, 295 U.S. 441, 443, 55 S.Ct. 794 (1935); *see also*, Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 334, 33 S.Ct. 510 (1913)("Nothing is better settled than that it is too late to

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of the state constitution *and* the federal Constitution. *See* Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676 (1940); *see also*, State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61 (1928); Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983).

raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort."); Radio Station WOW, Inc. v. Johnson, 326 U.S, 120, 128, 65 S.Ct. 1475 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition."); Godchaux Co. v. Estopinal, 251 U.S. 179, 181, 40 S.Ct. 116 (1919); McCorquodale v. Texas, 211 U.S. 432, 437, 29 S.Ct. 146 (1908).[2]

In the instant case, the Supreme Court of Ohio rejected petitioner's motion for reconsideration in summary fashion, by stating simply: "On motion for reconsideration, Motion denied." *See* Appendix A to Petition for a Writ of Certiorari. Clearly, there was no discussion by the state supreme court of any federal issue or of the generic due process issue that was raised for the first time in petitioner's motion for reconsideration.

There is only one other circumstance in which this Court has considered a federal issue that was first raised with a state supreme court on motion for reconsideration. This is where the ruling of the state supreme court that preceded the motion for reconsideration could not have been anticipated. Herndon, 295 U.S. at 444; *see also*, American Surety Co. v.

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[2] In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476, 95 S.Ct. 1029 (1975), this Court did accept jurisdiction where the federal issue (*i.e.*, First Amendment) was first raised on a motion for rehearing, but only where the Georgia Supreme Court, in its denial of that motion, explicitly entertained and decided the First Amendment issue.

Baldwin, 287 U.S. 156, 53 S.Ct. 98 (1932). In American Surety, the petitioner first raised a federal issue with the state supreme court in a motion for rehearing. Throughout all prior proceedings before the state court, the petitioner's arguments had been based solely on state law. The state supreme court denied the motion without opinion. Finding that the petitioner had "ample opportunity" to raise the federal issue before the state supreme court's decision on its appeal, and that the state supreme court's actions were not "unanticipated," this Court refused to consider the federal issue. *Id.* at 164.

Likewise, in the case at hand, petitioner had several occasions before filing its motion for reconsideration on which it could have raised the federal due process issue that it is raising now. Not only was the state supreme court's action (*i.e.*, not applying the amendment to O.R.C. § 2505.02) anticipated, this was the very action that petitioner repeatedly filed motions to prevent. After the amendment to O.R.C. § 2505.02 was enacted, but before it became effective, petitioner twice submitted motions to the Supreme Court of Ohio. Each time, petitioner argued that the amendment had to be applied in this case. First, petitioner urged the state supreme court to remand the case to the Butler County Court of Appeals in order for the lower court to consider the new amendment. *See* Appendix B. Then, petitioner asked the state supreme court to allow supplemental briefs on the amendment. *See* Appendix C. Both motions were denied. In these motions, petitioner never suggested that failure to apply this amendment would be a violation of due process. In fact, throughout this case, petitioner has relied wholly on state law arguments and, even in its motion for reconsideration, petitioner never invoked the federal Constitution. It was only upon asking this Court to grant certiorari that petitioner cited the Fourteenth Amendment.

Petitioner here is simply displeased with the opinion of the Ohio Supreme Court, which was decided exclusively on state law grounds. Having had its appeal dismissed under Ohio law, petitioner has now turned to this Court and in so doing has attempted to mask a state issue under the guise of the Fourteenth Amendment. Because petitioner never raised a federal due process issue until its petition for a writ of certiorari, the federal issue comes too late to fall within the purview of this Court.

B. Petitioner Cannot Manufacture a Federal Issue Where This Case Only Involved an Issue of State Law.

1. Petitioner's "Question Presented" Clearly Involves Only an Issue of State Law.

Petitioner's "Question Presented," which invokes the Fourteenth Amendment "when a state appellate court ignores a statute that becomes effective during the pendency of an appeal," not only misapplies federal law but also misstates the facts of the case. The true question here is one of state law regarding when and how the Ohio Supreme Court decides a case for the purpose of determining which version of an Ohio statute will apply to that decision. While petitioner claims that the case had not been decided by the time the amended O.R.C. § 2505.02 went into effect, the Ohio Supreme Court obviously disagreed, treating its decision as having been made *weeks before* this amendment went into effect. Irrefutable proof of this can be found in the dissenting opinion of Justice Lundberg Stratton, which stated, "I believe it is an injustice to the defendant *to issue this opinion a few weeks before that date* [*i.e.*, the amendment's effective date] so that the mere fate of timing prevents AK Steel from fitting within the terms

of the statute." 82 Ohio St. 3d at 392.

Further, Ohio Rev. Code § 2503.20 states, "[w]hen requested by the supreme court, the reporter of the supreme court shall . . . report and prepare its decisions for publication." Ohio law clearly contemplates that what is presented to the reporter for publication is the court's decision.[3] It is a matter of public information that it takes the Reporter of Decisions of the Ohio Supreme Court at least 23 days from the time a decision is rendered to typeset and publish the opinion. Thus, the fact that the publication date for the court's opinion was July 29, 1998 suggests that the court had finalized its decision by July 6, 1998 at the latest, which was, as Justice Lundberg Stratton characterized it, "a few weeks before" the effective date of the amendment.

Petitioner's suggestion that the Supreme Court of Ohio must take account of the law as it stands on the date a decision is published — in this case, a few weeks after the court actually finalized its decision — would lead to absurd results. Furthermore, petitioner's contention that only a published opinion qualifies as a decision of the Ohio Supreme Court is clearly erroneous. *See* O.R.C. § 2503.20; *see also*, Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164 (1959)(holding that a letter from the court clerk returning an appeal to an indigent appellant for non-payment of the docket fee was a "final judgment" of the Ohio Supreme Court.). Moreover, to the

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[3] Petitioner relies on Ohio cases for the proposition that a court's oral pronouncements or a judge's statements from the bench are not of force. *See*, State v. Keenan, 81 Ohio St.3d 133, 689 N.E.2d 929 (1998); Schenley v. Kauth, 160 Ohio St. 109, 113 N.E.2d 625 (1953). Respondents do not disagree, however Ohio law plainly establishes that the written opinion presented to the reporter for publication is the decision of the Ohio Supreme Court.

extent petitioner has raised any issue as to when a case is "decided" by the Supreme Court of Ohio, that is an issue for the Supreme Court of Ohio to decide. *See*, Herb v. Pitcairn, 324 U.S. 117, 120, 65 S.Ct. 459 (1945) ("[w]hether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court."). The Supreme Court of Ohio evidently decided that issue against petitioner under Ohio law when it denied petitioner's motion for reconsideration.

2. Petitioner Misconstrues Legal Precedent in an Attempt to Fabricate a Federal Due Process Issue.

Petitioner has cited several cases holding that a court should apply the law in effect at the time of the court's decision.[4] This argument fails because the Ohio Supreme Court did just that.

Ohio law holds that an amended law "is of no force or effect until the date so specified [*i.e.*, its effective date] and

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[4] Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006 (1974); Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 89 S.Ct. 518 (1968); Carpenter v. Wabash Ry. Co., 309 U.S. 23, 60 S.Ct. 416 (1940); United States v. Schooner Peggy, 1 Cranch 103 (1801); and Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565 (9th Cir. 1994). The cases cited by the petitioner are not relevant to this inquiry as the Ohio Supreme Court applied the law in effect at the time of its decision. It should be noted further that these cases do not support the petitioner's argument because *not one* involved a state court not applying an effective state statute, and *not one* holds that a failure to apply the law in effect at the time of the decision is a due process violation.

the old law that is to be thereby amended or repealed remains in full force and operation until that time unless a different intention is manifest." Mott v. Fulton , 21 Ohio Law Abs. 366, 368 (Ohio Ct. App. 1935). Likewise, in Landgraf v. USI Film Products, 511 U.S. 244, 257, 114 S.Ct. 1483 (1994), this Court held that "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."[5] No case has ever held that, if the law changes between a court's rendering of its decision and the publication of that decision, the court must "stop the presses" to revisit the matter.

The amendment at issue in this case was enacted on April 22, 1998. Article II, § 1c of the Ohio Constitution states that a law passed by the Ohio General Assembly cannot become effective for 90 days. This means the effective date of the amendment was July 22, 1998. As such, the amendment had no place in the Ohio Supreme Court's deliberations and decision, which clearly were completed weeks prior to the effective date of amended O.R.C. § 2505.02. In faulting the Ohio Supreme Court for honoring the 90-day waiting period, petitioner is essentially asking this Court to mandate that the highest court of Ohio step beyond the bounds of the judiciary,

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[5] Landgraf states the general rule that retrospective legislation is disfavored as it can lead to "vindictive legislation." *Id.* at 267. The Court noted that "James Madison argued that retroactive legislation offered special opportunities for the powerful to obtain special and improper legislative benefits." *Id.* at 267 n.20. Indeed, petitioner's retroactive construction of O.R.C. § 2505.02 would confirm Madison's fears, as the legislative record of the Ohio General Assembly reveals that counsel for petitioner personally drafted and lobbied for the amendment to O.R.C. § 2505.02 at issue here.

beyond the bounds of the legislature, and beyond the bounds of the Ohio Constitution itself. Petitioner is asking this Court to require the Ohio Supreme Court to read Ohio law as the oracle read the oak leaves of Dodona. A state supreme court cannot render its decision based upon forecasted law, but only upon the law as it exists when the justices make their decision. Because the Supreme Court of Ohio had already finalized its decision in this case when the amendment came into effect, petitioner here is asking for more than retroactive application of a statute where even that is not mandated. Rather, petitioner is asking this Court to establish a rule that would resurrect matters already decided and foreclosed, in the event there is a subsequent change in the law. The ramifications of such an ill-conceived notion are staggering.

Petitioner concedes that the cases it cites do not support its due process argument. Petition for Writ of Certiorari, p. 15 ("[N]either Schooner Peggy, Bradley, nor any subsequent decisions of this Court has expressly articulated that a failure to adhere to this principle is a violation of due process of law.") Because of this conceded lack of support for its due process argument, petitioner has overreached for cases involving the right of access to the courts, all in an effort to create a new fundamental right under the Constitution. However, petitioner's assertion that an interlocutory appeal is a fundamental right is fundamentally flawed. Each of the cases cited by petitioner involved a party's cause of action being extinguished, and thus complete inaccessibility to the courts.[6] None involved a court's refusal

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[6] Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982); Boddie v. Connecticut, 401 U.S.371, 91 S.Ct. 780 (1971); Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997); In re: Cincinnati Radiation Litig., 874 F.Supp. 796

to permit an interlocutory appeal. In the case at hand, petitioner's access to the courts has not been severed by the decision of the Ohio Supreme Court. Petitioner's right to appeal has not been destroyed, but merely deferred. Petitioner will still have the opportunity to appeal from a final judgment, as is the case in federal courts. *See, e.g.* Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988). There was no such further opportunity in the cases upon which petitioner relies. No case has ever held that an interlocutory appeal is a fundamental right, and there is no suggestion in these cases that such an expansion of this doctrine has ever been contemplated or is now warranted. Petitioner can only characterize the harm done to it as a transgression of a "fairness principle," which is a far cry from a cognizable due process violation.

Petitioner's suggestion that this Court must declare it a federal due process violation for any court not to apply a change in any law that became effective during the pendency of an appeal is not only unsupported by established constitutional precedents, it would also be in clear contravention of the general rule disfavoring retroactive legislation.[7] Making all cases on appeal subject to a change in the law, as petitioner suggests, would bring chaos upon judiciary. Moreover, there simply is no issue in this case as to retroactive legislation because the Ohio Supreme Court was following the law in effect at the time it made its decision. Once a case has been decided, a subsequent change in the law cannot undo a court's ruling.

(S.D. Ohio 1995).

[7] *See*, Langraf, 511 U.S. at 272, holding that "prospectivity remains the appropriate default rule."

C. The Decision of the Ohio Supreme Court Can Be Sustained on Independent State Law Grounds.

The Supreme Court will not review judgments of state courts that rest on adequate and independent state law grounds. Herb v. Pitcairn, 324 U.S. at 125-126; Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183 (1935); Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U.S. 157, 164, 37 S.Ct. 318 (1917); Berea College v. Commonwealth of Kentucky, 211 U.S. 45, 53, 29 S.Ct. 33 (1908); Murdock v. City of Memphis, 20 Wall. 590, 636, 22 L.Ed. 429 (1874). This Court has held that its inability to review state judgments "is so obvious that it has rarely been thought to warrant statement . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Herb, 324 U.S. at 125-126.

Even when a petitioner has raised both federal and state issues before the state supreme court (as demonstrated, petitioner here did not), and the state court decides the matter against the petitioner without writing an opinion (as with the denial of petitioner's motion for reconsideration), this Court will not take jurisdiction where it appears the judgment could be sustained on state law grounds. To overcome the presumption that state grounds were relied upon, a petitioner must affirmatively demonstrate that state grounds did not account for the decision. Durley v. Mayo 351 U.S. 277, 281, 76 S.Ct. 806 (1956); *see also*, Radio Station WOW, 326 U.S. at 129; Abie State Bank v. Weaver, 282 U.S. 765, 773, 51 S.Ct. 252 (1951); Lynch v. People of New York ex rel.

Pierson, 293 U.S. 52, 54-55, 55 S.Ct. 16 (1934). Petitioner has made no such showing. It would be implausible for petitioner to claim that state grounds were not relied upon by the Ohio Supreme Court in its decision affirming the dismissal of petitioner's appeal or in its decision denying petitioner's motion for reconsideration, since petitioner itself only relied upon Ohio law in arguing its case to that court. Petitioner's "due process" argument was an afterthought that came about only because petitioner lost its appeal to the Ohio Supreme Court on the merits.

As noted above, in claiming its due process rights were violated when the Ohio Supreme Court did not apply the amendment to O.R.C. § 2505.02, petitioner has overlooked the most plausible explanation of why that court did not apply the amendment – because the amended statute was not in effect at the time the justices made their decision. *See* discussion, *ante*. The Ohio Supreme Court was neither acting "arbitrarily" nor "ignoring" the amendment to O.R.C. § 2505.02, as petitioner suggests in its "Question Presented."[8] Rather, the Ohio Supreme Court was applying Ohio law as it

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[8] The state law cases on which petitioner relies in arguing the Ohio Supreme Court ignored the amended statute are also inapposite. Junge v. Brothers, 16 Ohio St.3d 1, 475 N.E.2d 477 (Ohio 1975), involved a change in the common law which occurred before the appellate court rendered its decision, as the court discussed the change in its opinion. In Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), the court found that a change in the wording of a statute, making it more difficult to bring a cause of action, was a substantive right and thus the court would not apply the statute retroactively. Further, in Ohio, before a state statute can be applied retroactively, a court must first determine if it violates the ban against retrospective application in Article II, § 28 of the Ohio Constitution. *Id.*

existed at the time the justices made their decision in this case.

Moreover, it is unfair of petitioner to attempt to sound constitutional alarms by suggesting that the Ohio Supreme Court is ignoring amended O.R.C. § 2505.02 now. In State ex rel. Herdman v. Watson, 83 Ohio St.3d 537, 700 N.E.2d 1270 (Ohio 1998), which was heard in September 1998, the Supreme Court of Ohio considered the case in light of the amended O.R.C. § 2505.02. This shows the Supreme Court of Ohio is following Ohio law, just as it did when it decided this case both on the merits and on petitioner's motion for reconsideration.

There has been no showing of any federal issue in this case. Petitioner merely wishes to have this Court issue an advisory opinion. This case is not worthy of the jurisdiction of this Court, inasmuch as there is no substantial federal issue, generic due process concerns were only raised after the Ohio Supreme Court rendered its decision, federal due process was never raised with the state supreme court, and the decision of that court can be sustained on state law grounds.

CONCLUSION

This case involves issues of Ohio law. Petitioner's belated effort to inject a federal issue comes too late to warrant the consideration of this Court. This is not an instance of a state court acting in defiance of the United States Constitution. Here, the highest Ohio court followed Ohio law in a ruling against petitioner, who argued the case under Ohio law. Rather than respect the ruling of the Ohio Supreme Court, petitioner has attempted to create a federal issue where there is none.

Raising a federal issue for the first time in its petition for a writ of certiorari is, at best, an afterthought. Raising a federal issue for the first time on a motion for reconsideration comes too late for this Court to grant certiorari. A substantial federal issue not only must be raised in state court proceedings, but it also must be entertained and ruled upon by the state court. Where petitioner failed to raise its generic due process issue prior its motion for reconsideration before the Ohio Supreme Court, and where petitioner failed to raise a *federal* due process issue prior to filing its petition before this Court, the federal issue is untimely and the petition must be denied. The decision of the Ohio Supreme Court is firmly rooted in Ohio law alone. The court rendered its decision in accordance with the law in effect at the time the justices made their decision, as explained in the dissenting opinion. A change in the law that comes about after a court has rendered its decision cannot undo the court's ruling.

AK Steel's petition for a writ of certiorari is without foundation as a procedural, factual, and legal matter. As such, it cannot withstand the scrutiny of this Court. Because petitioner's due process claims were not raised in a timely manner, no substantial federal issue was articulated prior to the petition for certiorari, and the decision of the Ohio Supreme Court can be sustained on independent state law grounds, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

§ 2505.02 Final Order. (superseded)

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

HISTORY: CC § 2223-2; 116 v 104; 117 v 615 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412. Eff 3-17-87.

APPENDIX B

IN THE SUPREME COURT OF OHIO

[Filed April 24, 1998]

JEFF CHAMBERLAIN, et al.,	)**Case No. 97-1626**
	)
Plaintiffs-Appellees,	)**On Appeal from**
	)**the Butler County**
vs.	)**Court of Appeals,**
	)**Twelfth Appellate**
AK STEEL CORPORATION,	)**District**
	)
Defendant-Appellant.	)

/

MOTION OF APPELLANT AK STEEL CORPORATION TO VACATE HEARING ON MERITS AND TO REMAND CASE TO BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT, FOR CONSIDERATION OF RECENTLY ENACTED AMENDMENT TO O.R.C. § 2505.02

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COUNSEL FOR *AMICUS CURIAE* OHIO CHAMBER OF COMMERCE URGING REVERSAL

I. Introduction

Appellant AK Steel Corporation ("AK Steel") respectfully moves the Court for an order remanding this case to the Butler County Court of Appeals, Twelfth Appellate District, so that the court of appeals may consider the effect of a recent amendment to Ohio Rev. Code § 2505.02. The subject of this appeal is the propriety of the decision by the court of appeals to dismiss under Ohio Rev. Code § 2505.02 AK Steel's appeal of the trial court's decision granting class certification. As subsequently amended and clarified, Ohio Rev. Code § 2505.02 now expressly makes decisions granting class certification immediately appealable. The court of appeals should be afforded the opportunity in the first instance to address the effect of this recently enacted amendment on its decision to dismiss AK Steel's appeal under Ohio Rev. Code § 2505.02. Therefore, the hearing on the merits in this case currently scheduled for May 26, 1998 should be vacated, and the case should be remanded to the court of appeals for reconsideration of its decision in light of the change to Ohio Rev. Code § 2505.02.

II. Argument

On October 15, 1997, this Court granted jurisdiction to hear this case and allowed AK Steel's appeal. The issue on appeal is whether the trial court's order granting class certification is a final appealable order under Ohio Rev. Code § 2505.02. Prior to the recent amendment, Ohio Rev. Code § 2505.02 did not expressly provide that decisions granting class certification were final appealable orders. The issue addressed by the court of appeals thus was whether an order granting class certification was immediately appealable under

the general language of Ohio Rev. Code § 2505.02. The court of appeals construed that general language in former Ohio Rev. Code § 2505.02, and concluded that, under such language, decisions granting class certification were not final appealable orders.

One of the key cases argued by the parties and addressed by the court of appeals below with respect to construing the language of former Ohio Rev. Code § 2505.02 is *Walters v. The Enrichment Center of Wishing Well, Inc.* (1997), 78 Ohio St. 3d 118. In that case, this Court noted that one option to address the problems with respect to that language "would be for Ohio to consider modifying R.C. 2505.02. . . ." *Id. at* 123, fn. 2, Ohio has done just what this Court suggested. Recently, Governor Voinovich signed into law Substitute House Bill No. 394, which amends and clarifies Ohio Rev. Code § 2505.02. The changes to Ohio Rev. Code § 2505.02 go beyond just the appealability of class certification orders, but specifically with respect to such orders, § 2505.02, as amended, now states as follows:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> . . . .
>
> (5) An order that determines that an action may or may not be maintained as a class action.

Ohio Rev. Code § 2505.02(B)(5), as amended by Substitute House Bill Number 394, 122nd General Assembly, Regular Session 1997-1998, Section 1(D), (hereinafter H.B. No. 394)

(copy attached hereto as Exhibit A). As now amended, Ohio Rev. Code § 2505.02 thus expressly provides that a decision granting class certification is a final appealable order. The amendment to Ohio Rev. Code § 2505.02 further states that it applies to all pending actions, including appeals. Ohio Rev. Code § 2505.02(D) (as amended by H.B. No. 394).

As a general rule, when there has been a change in the law subsequent to a decision on appeal from a lower court, the reviewing court will remand the case back to the lower court to allow the lower court the opportunity in the first instance to determine the impact of that change in the law on its decision. *See. e.g., Paulussen v. Herion,* 475 U.S. 557 (1986). That is, of course, consistent with the related established policy of refraining from reviewing questions on appeal not presented first to a lower court. *See. e.g., Settlemyer v. Wilmington Veterans Post No. 49* (1984), 11 Ohio St. 3d 123, 126, 464 N.E.2d 521,524. In the present case, the amendment to Ohio Rev. Code § 2505.02 was not enacted until after the merit briefs in this Court were filed, and therefore the parties had no opportunity to address this amendment in the court of appeals below and the court of appeals had no opportunity to consider it. In keeping with the policy of allowing the lower courts to review issues before they are considered by a reviewing court, this Court should vacate the hearing on the merits in this case currently scheduled for May 26, 1998 and remand this action to the Butler County Court of Appeals, Twelfth Appellate District, for consideration in the first instance of the impact of the recent amendments to Ohio Rev. Code § 2505.02 on its decision to dismiss AK Steel's appeal.

Respectfully submitted,

By: /s/_____
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been served by ordinary U.S. mail, postage prepaid, on this 24th day of April, 1998, upon the following persons at the address below his or her name:

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EXHIBIT A

(122nd General Assembly)
(Substitute House Bill Number 394)

AN ACT

To amend section 2505.02 of the Revised Code to specify circumstances under which an order granting or denying a provisional remedy is a final appealable order and to specify that an order that determines whether an action may be maintained as a class action is a final appealable order.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 2505.02 of the Revised Code be amended to read as follows:

Sec. 2505.02 (A) AS USED IN THIS SECTION:

(1) "SUBSTANTIAL RIGHT" MEANS A RIGHT THAT THE UNITED STATES CONSTITUTION, THE OHIO CONSTITUTION, A STATUTE, THE COMMON LAW, OR A RULE OF PROCEDURE ENTITLES A PERSON TO ENFORCE OR PROTECT.

(2) "SPECIAL PROCEEDING" MEANS AN ACTION OR PROCEEDING THAT IS SPECIALLY CREATED BY STATUTE AND THAT PRIOR TO 1853 WAS NOT DENOTED AS AN ACTION AT LAW OR A SUIT IN EQUITY.

(3) "PROVISIONAL REMEDY" MEANS A PROCEEDING ANCILLARY TO AN ACTION, INCLUDING, BUT NOT LIMITED TO, A PROCEEDING

FOR A PRELIMINARY INJUNCTION, ATTACHMENT, DISCOVERY OF PRIVILEGED MATTER, OR SUPPRESSION OF EVIDENCE.

(B) AN ORDER IS A FINAL ORDER THAT MAY BE REVIEWED, AFFIRMED, MODIFIED, OR REVERSED, WITH OR WITHOUT RETRIAL, WHEN IT IS ONE OF THE FOLLOWING:

(1) An order that affects a substantial right in an action ~~which~~ THAT in effect determines the action and prevents a judgment, ~~an~~;

(2) AN order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, ~~or an~~;

(3) AN order that vacates or sets aside a judgment or grants new trial ~~is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial~~;

(4) AN ORDER THAT GRANTS OR DENIES A PROVISIONAL REMEDY AND TO WHICH BOTH OF THE FOLLOWING APPLY;

(a) THE ORDER IN EFFECT DETERMINES THE ACTION WITH RESPECT TO THE PROVISIONAL REMEDY AND PREVENTS A JUDGMENT IN THE ACTION IN FAVOR OF THE APPEALING PARTY WITH RESPECT TO THE PROVISIONAL REMEDY.

(b) THE APPEALING PARTY WOULD NOT BE AFFORDED A MEANINGFUL OR EFFECTIVE REMEDY BY AN APPEAL FOLLOWING FINAL JUDGMENT AS TO ALL PROCEEDINGS, ISSUES, CLAIMS, AND PARTIES IN THE ACTION.

(5) AN ORDER THAT DETERMINES THAT AN ACTION MAY OR MAY NOT BE MAINTAINED AS A CLASS ACTION.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) THIS SECTION APPLIES TO AND GOVERNS ANY ACTION, INCLUDING AN APPEAL, THAT IS PENDING IN ANY COURT ON THE EFFECTIVE DATE OF THIS AMENDMENT AND ALL CLAIMS FILED OR ACTIONS COMMENCED ON OR AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, NOTWITHSTANDING ANY PROVISION OF ANY PRIOR STATUTE OR RULE OF LAW OF THIS STATE.

SECTION 2. That existing section 2505.02 of the Revised Code is hereby repealed.

/s/_____
JoAnn Davidson
*Speaker*_____*of the House of Representatives.*

/s/_____
Richard Finan
*President*_____ *of the Senate*

Passed April 2, 1998

Approved April 22, 1998

/s/_____
George Voinovich
Governor.

APPENDIX C

IN THE SUPREME COURT OF OHIO

[Filed May 8, 1998]

JEFF CHAMBERLAIN, et al.,	)**Case No. 97-1626**
	)
Plaintiffs-Appellees,	)**On Appeal from**
	)**the Butler County**
vs.	)**Court of Appeals,**
	)**Twelfth Appellate**
AK STEEL CORPORATION,	)**District**
	)
Defendant-Appellant.	)

_____/

MOTION OF APPELLANT AK STEEL CORPORATION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS ADDRESSING IMPACT OF RECENTLY ENACTED AMENDMENT TO O.R.C. § 2505.02

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COUNSEL FOR *AMICUS CURIAE* OHIO CHAMBER OF COMMERCE URGING REVERSAL

I. Introduction

Appellant AK Steel Corporation ("AK Steel") respectfully moves the Court to permit the parties to file supplemental briefs addressing the effect on the issues in this appeal of a recent amendment to Ohio Rev. Code § 2505.02. The key issue in this appeal is the propriety of the decision by the court of appeals to dismiss under Ohio Rev. Code § 2505.02 AK Steel's appeal of the trial court's decision granting class certification. As subsequently amended and clarified, Ohio Rev. Code § 2505.02 expressly makes decisions granting class certification immediately appealable.[1] In the present case, the amendment to Ohio Rev. Code § 2505.02 was not enacted until after the merit briefs in this Court were filed, and therefore the parties had no opportunity to address the impact of this amendment in those briefs.

The hearing on the merits in this case currently is scheduled for May 26, 1998. AK Steel previously moved to vacate that hearing date and to remand the case to the Court of Appeals below. The reason underlying that motion was to give this Court the benefit of having the issue of the impact of the recent amendment to Ohio Rev. Code § 2505.02 being briefed, argued and decided in a lower court before this Court needed to address that issue. By Order filed May 1, 1998, this Court denied AK Steel's motion to remand. Given that decision, AK Steel respectfully submits that it would be beneficial to the Court to receive supplemental briefs from the

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[1] The bill amending Ohio Rev. Code § 2505.02 was formally signed into law on April 22, 1998. It will become effective July 21, 1998.

parties in advance of the May 26, 1998 oral argument in this case which set out the parties' respective positions as to the impact of the recent amendments to Ohio Rev. Code § 2505.02 on the decision by the court of appeals below to dismiss AK Steel's appeal of the trial court order granting class certification.

For the foregoing reasons, AK Steel proposes that both parties be given an opportunity to file their supplemental briefs before the May 26, 1998 hearing in this case. Specifically, AK Steel proposes that such briefs be limited to five pages of argument and that they be due on or before Friday, May 22, 1998. This will give the Court the opportunity to be informed of the parties' respective positions on this new issue in advance of the oral argument.

Respectfully submitted,

By: /s/_____
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